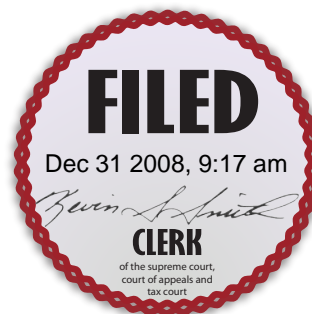


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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY J. HARVEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A05-0805-CR-259

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0601-MR-1

December 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Timothy Harvey challenges his conviction for the murder of Ricky Chapman. Specifically, Harvey contends that the trial court abused its discretion by admitting into evidence his statement to police confessing to the murder. Harvey argues that his warrantless arrest was not supported by probable cause, making his resulting confession inadmissible, and that his statement to police was not voluntary. Finding that Harvey's arrest was supported by probable cause and that the evidence is sufficient to show that Harvey's confession was voluntary, we affirm his conviction.

Facts and Procedural History

On December 25, 2005, Gary Police Department Officer Jackie Reid responded to a missing person report by traveling to Chapman's home in Hammond, Indiana. Chapman was last seen on December 22, 2005. On December 22, after work, Chapman had gone to an ATM and withdrawn \$1000 in cash, but he did not arrive at his family's holiday gathering in St. Louis as expected. His family then called to report him missing.

Officer Reid met a relative of Chapman's at his home and contacted the fire department to gain entry to the residence. Once inside, Officer Reid found Chapman, deceased and face down, in the basement. Officer Reid secured the scene and contacted Deputy Chief Thomas Branson, who arrived at the scene and found Sellier and Belloit brand shell casings. It was determined that Chapman died as a result of four gunshot wounds to the head and back. Chapman's wallet and money were not found at the scene and were never recovered.

Detective Lorenzo Davis then joined the investigation. Detective Davis began canvassing the neighborhood and spoke with one of the neighborhood residents, Harvey's father. Detective Davis learned from Harvey's father that Harvey and Chapman were friends and that Harvey lived nearby with another friend, Albert McFall. Detective Davis then went to McFall's home and learned that Harvey visited Chapman's home for fifteen to twenty minutes on December 22 and returned nervous, shaking, and without the gun he was known to carry. McFall told the officers that Harvey had then received a ride to the home of McFall's sister, Kamika Weathersby. After speaking to Weathersby, Detective Davis learned that after leaving her home, Harvey had called Weathersby and instructed her to put a fur coat he had left behind into a hole in her garage. Police officers recovered the coat and found inside it a box of Sellier and Belloit bullets. The police also learned that soon after Chapman's body was discovered, Harvey purchased a car. Detective Davis learned that Harvey was now staying in a nearby abandoned house, and when officers arrived there on December 31 to arrest him, Harvey fled from the officers.

After Harvey was arrested and read his *Miranda* rights, Detective Davis interviewed Harvey at the police department. Detective Davis read Harvey his rights again and Harvey then read and signed a *Miranda* waiver. Harvey then gave a statement to the police, confessing to shooting Chapman and taking his wallet, which contained about \$700 in cash.

The State charged Harvey with murder.¹ On the first day of his jury trial, Harvey filed a motion to suppress his statement to police confessing to the murder, which the

¹ Ind. Code § 35-42-1-1.

court denied after a hearing held outside the presence of the jury. After the jury convicted him of murder, the trial court sentenced Harvey to the Indiana Department of Correction for fifty-five years executed. Harvey now appeals.

Discussion and Decision

Harvey challenges his conviction, arguing that the court erred by admitting, over his objection, his confession to police. Specifically, Harvey contends that the trial court erred by admitting his statement to police into evidence because the police lacked probable cause to arrest him. Harvey also contends that he did not make a voluntary confession because he had smoked three or four marijuana blunts laced with PCP just before his arrest, the police falsely stated they possessed more physical evidence connecting him to the crime than they really did, and the police informed him that the death penalty was possible if he did not confess.

Trial courts have broad discretion in determining the admissibility of evidence. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. *Kelley v. State*, 825 N.E.2d 420, 427 (Ind. Ct. App. 2005). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

I. Probable Cause for Arrest

Harvey argues that because the record demonstrates that there was no probable cause to arrest him, the police lacked authority to make a warrantless arrest and his resulting confession should have been excluded as the product of an improper arrest. The

Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, protects people from unreasonable government intrusions into areas of an individual's life in which he or she has a reasonable expectation of privacy. *State v. Friedel*, 714 N.E.2d 1231, 1237 (Ind. Ct. App. 1999). "The fundamental purpose of the Fourth Amendment is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes and their belongings." *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006) (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). The Fourth Amendment requires that an arrest or detention that lasts for more than a short period of time must be justified by probable cause. *State v. Calmes*, 894 N.E.2d 199, 202 (Ind. Ct. App. 2008).

In felony cases, arrest warrants are only required when physical entry of a home is necessary to effect the arrest. *Stevens v. State*, 691 N.E.2d 412, 423 (Ind. 1997), *reh'g denied*. Warrantless arrests outside the home are permissible so long as the arresting officer has probable cause to believe the defendant committed a felony. *Id.* "Probable cause adequate to support a warrantless arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect committed a criminal act." *Griffith v. State*, 788 N.E.2d 835, 840 (Ind. 2003). "The amount of evidence necessary to meet the probable cause requirement is determined on a case-by-case basis . . . and the facts and circumstances need not relate to the same crime with which the suspect is ultimately charged." *Ortiz v. State*, 716 N.E.2d 345, 348 (Ind. 1999) (citation omitted).

In the instant case, our review of the record reveals that the police had probable cause to arrest Harvey for Chapman's murder. During the course of the investigation ensuing after the discovery of Chapman's body, the detectives learned from Harvey's father that Harvey and Chapman were friends and that Harvey also lived near Chapman. The detectives learned that Chapman had withdrawn a large sum of money the last day he was seen alive, but no money was found at the scene. The detectives discovered that Harvey purchased a vehicle on December 28.

Detective Davis testified that other friends of Harvey's had told him that Harvey had said to his friends that he went to a house and did something wrong. Detective Davis also testified that McFall, a friend of Harvey's, told him that Harvey had gone to Chapman's house on December 22. As recounted in the probable cause affidavit, which Harvey did not challenge, the detectives learned from McFall that on the evening of December 22, 2005, Harvey told him that he was going to Chapman's house to pick up some blunts to smoke and left. McFall told the detectives that when Harvey returned fifteen to twenty minutes later Harvey was nervous and shaking. When McFall questioned Harvey about what was wrong, Harvey had responded that he "just did some dirt." Appellant's App. p. 12. Harvey then grabbed some clothes from the house and told McFall that he was going to stay with McFall's sister, Weathersby, for a few days. McFall also told the detectives that Harvey was known to carry a gun, but he did not see the gun on December 22. *Id.*

When the detectives spoke to Weathersby, they learned that Harvey had spent the night at her house and she had dropped him off at another location the next day.

Weathersby told the police that shortly after she had dropped Harvey off, he called her and told her to take the black fur coat he had left at her residence and put it into a hole in her garage. When the detectives retrieved the coat, they discovered a box of Sellier and Belloit bullets inside it. The shell casings recovered from the murder scene were the same brand, and Deputy Chief Branson testified that in his twenty years of homicide investigations he had never before seen that type of bullet. When the detectives went to the seven hundred block of Johnson Street to search for Harvey, Harvey fled from the detectives after spotting them. Based on these circumstances, we find that the police had sufficient evidence to meet the probable cause requirement for a warrantless arrest.

II. Voluntariness of Confession

Next, Harvey argues that the trial court abused its discretion in admitting his confession because it was not voluntary. The decision whether to admit a confession is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion. *Jones v. State*, 655 N.E.2d 49, 56 (Ind. 1995), *reh'g denied*. When a defendant challenges the admissibility of his confession the State must prove beyond a reasonable doubt that it was given voluntarily. *Jackson v. State*, 735 N.E.2d 1146, 1155 (Ind. 2000). On review, this Court looks to the totality of the circumstances surrounding the waiver or confession. *Id.* Our focus is whether the waiver or confession was free and voluntary and not induced by any violence, threats, promises, or other improper influences. *Williams v. State*, 715 N.E.2d 843, 846 (Ind. 1999). When considering the admissibility of a confession on appeal, we will uphold the finding of the trial court if

there is substantial evidence of probative value to support it. *Snellgrove v. State*, 569 N.E.2d 337, 343 (Ind. 1991).

Harvey points out that at the suppression hearing before his trial, which was held outside the presence of the jury, the trial court stated incorrectly that the “burden of proof here is the preponderance of the evidence.” Tr. p. 113. Harvey also alleges that his confession was involuntary because he was intoxicated, the police deceived him as to how much physical evidence connected him to the crime, and the police informed him that his crime was eligible for the death penalty if he did not confess.

As for Harvey’s argument that his conviction must be reversed because the trial court misstated the burden of proof, we note initially that Harvey failed to provide the trial court with the correct standard in either his motion to suppress or at the hearing on his motion. Although the trial court’s description of the burden of proof was not complete,² we are mindful of our deferential standard of review, which requires us to uphold the finding of the trial court if there is substantial evidence of probative value to support it. We find the evidence was substantial enough here to find that Harvey’s confession was voluntary beyond a reasonable doubt.

Deputy Chief Branson testified that Harvey was read his *Miranda* rights when he was arrested. At the Gary Police Department, Detective Davis read Harvey his rights again. Harvey told the detectives that he could read, and Detective Davis gave Harvey the opportunity to read the waiver of *Miranda* rights for himself after he had read the waiver to Harvey. Harvey then initialed each provision and signed the waiver

² The federal constitution requires the State to prove only by a preponderance of the evidence that a defendant’s confession was voluntarily given. However, Indiana requires the State to prove voluntariness beyond a reasonable doubt. *Jackson*, 735 N.E.2d at 1153 n.4.

acknowledging his rights and agreeing to talk to the police voluntarily. Harvey admits that he did sign this *Miranda* rights waiver. Appellant's Br. p. 8. After Harvey signed this waiver, he gave his statement to police.

As for Harvey's contention that his statement was involuntary because he had smoked several marijuana blunts laced with PCP before his interrogation, if voluntariness of a statement is challenged on the basis that the defendant was under the influence of drugs, the defendant has the burden to introduce evidence from which it could be concluded that the amount and nature of the drug consumed would produce an involuntary statement. *Pruitt v. State*, 834 N.E.2d 90, 115 (Ind. 2005), *reh'g denied*. The mere fact that the defendant is under the influence of drugs does not make a statement inadmissible *per se*. *Id.* Intoxication and drug use are only factors to be considered when determining whether the statement was voluntary. *Id.* A confession is rendered inadmissible due to intoxication only when an accused is so intoxicated that he is unaware of what he is saying. *Id.* Intoxication of a lesser degree goes to the weight given to the statement and not its admissibility. *Id.*

Detective Davis testified that he had extensive training and experience in determining whether someone was intoxicated due to his time serving as a traffic officer and his six years with the Gary Police Department narcotics division before serving as a detective with the Gary Police Department. Detective Davis testified that, throughout the hour-long interview, Harvey gave coherent, responsive answers to his questions and did not appear to be intoxicated. Deputy Chief Branson also testified that Harvey was coherent and responsive throughout the interview. The trial court found that Harvey was

not intoxicated because Harvey's own written statement showed that he gave direct answers to specific questions. Additionally, Harvey's testimony at the hearing showed that he remembered many of the events and details surrounding the giving of his statement, including the names of the detectives present and even the nickname of one of the detectives.³ The State presented enough evidence to show beyond a reasonable doubt that, even if Harvey was under the influence of drugs during the interview, Harvey was not unaware of what he was saying. Thus, Harvey fails to demonstrate his confession was involuntary due to intoxication.

Harvey also argues that his statement was involuntary because the police deceived him as to how much physical evidence connected him to the crime. Harvey testified that the police falsely told him that they had found blood on his jacket and that a DNA test proved the blood was Chapman's. Detective Davis testified that they told Harvey that they had his jacket and the bullets inside but did not tell him they found blood on the jacket. Deputy Chief Branson also testified that the detectives told Harvey about the coat and the bullets but never said during the interview that there was blood on the coat or DNA evidence linking Harvey to the murder. Even if Harvey is correct that the police made statements that were not factually accurate during the interview, police deception does not automatically render a confession inadmissible. *Clark v. State*, 808 N.E.2d 1183, 1191 (Ind. 2004). Rather, it is only one factor to consider in the totality of the circumstances. *Id.* We find that the trial court's conclusion that Harvey's confession could not be deemed involuntary due to police deception is supported by the evidence.

³ Detective Richardson, one of the detectives present at Harvey's interview, goes by the name "Kiki." Tr. p. 45.

Finally, Harvey argues that his statement was involuntary because the police informed him that his offense was eligible for the death penalty if he did not confess. Statements by police expressing a desire that a suspect cooperate and explaining the crimes and penalties that are possible results are not specific enough to constitute either promises or threats. *Id.* Detective Davis testified that Deputy Chief Branson discussed the possible penalties with Harvey, which included the death penalty. Detective Davis testified that none of the detectives promised Harvey a lesser punishment if he cooperated. Deputy Chief Branson testified that he explained to Harvey the broad range of penalties from the maximum to the minimum sentence. When asked if the death penalty truly was the possible maximum sentence, Deputy Chief Branson testified that because it was possible that the murder was committed in the perpetration of a robbery, the crime was eligible for the death penalty. Deputy Chief Branson further testified that he did not give any indication to Harvey that cooperation with the police would eliminate any of the possible sentences or charges. We note that Deputy Chief Branson is correct that if a defendant commits murder by intentionally killing the victim while committing or attempting to commit a robbery, the State may seek a death sentence. Ind. Code § 35-50-2-9(b)(1)(B). The trial court was entitled to find that the police did not threaten Harvey or make any impermissible promises to him. We cannot say that the trial court erred by finding that Harvey's confession was voluntary. As a result, we affirm the judgment of the trial court and Harvey's conviction.

Affirmed.

RILEY, J., and DARDEN, J., concur.